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14 UNITED STATES DISTRICT COURT

15 NORTHERN DISTRICT OF CALIFORNIA

16)	Case No. 3:22-cv-06119-WHA
17	GABRIEL CHAVEZ, MARY ENGLER-)	
	CONTRERAS, RHIANNON DOYLE,)	Related Cases:
18	SUSAN RICHARDSON, JOHNATHAN)	Case No. 3:22-cv-09193-WHA
	CASTANEDA, JAMES GILHEANY, PHI)	Case No. 3:22-cv-07720-WHA
19	LI GEMA ESPINOZA-CARR, AVIN)	
	CURRY on behalf of themselves and all)	
20	other similarly situated persons,)	
)	BART'S SUPPLEMENTAL
21	Plaintiffs,)	PRETRIAL CONFERENCE
)	STATEMENT
22	vs.)	Trial: October 15, 2024
)	Pretrial Conf.: September 4, 2024
23	SAN FRANCISCO BAY AREA RAPID)	
	TRANSIT DISTRICT, and DOES 1-100)	
24)	
	Defendants.)	
25)	

1 Following a mistrial, the Court set these consolidated cases for retrial on October 15,
 2 2024, and scheduled a pretrial conference for September 4, 2024. (Dkt. 151.) BART files this
 3 Supplemental Pretrial Conference Statement to address one area of concern with the Court's
 4 scheduling order.

5 The Court has ordered that the case be retried in phased groupings of plaintiffs, as
 6 previously ordered. (Dkt. 151.) The first phase will include seven plaintiffs and address
 7 BART's affirmative defense that each plaintiff could not be reasonably accommodated to work
 8 while unvaccinated without imposing an undue burden. (*Id.*) The Court has ordered that
 9 plaintiffs and defendant will have 200 minutes, respectively, for all witness examination during
 10 that phase of the case. (*Id.*)

11 BART objects that the 200 minutes allocated are insufficient. The first phase of trial as it
 12 proceeded in July is a sound guide. BART completed its witness examinations during that phase
 13 of trial in approximately 340 minutes. BART conducted its examinations efficiently, and did not
 14 unduly consume jury time. The Court has ordered that retrial will not include two sets of issues
 15 that were addressed previously – plaintiffs' prima facie cases (because the Court has entered a
 16 partial verdict on those) and damages (which are being bifurcated). Even with the reduced
 17 scope, BART will require more than 200 minutes to fairly present its affirmative defense, on
 18 which it bears the burden of proof.¹

19 The chart below states BART's anticipated examination time for the applicable witnesses
 20 in the first phase, comparing BART's estimated examination time from the prior trial (the
 21 transcript records only start and stop times, so only estimates are possible) with the estimated
 22 time for the October 15 retrial:

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27 ¹ This statement and the request herein are without prejudice to BART's pending motion
 28 In Limine No. 3 (*see* Dkt. 115 at 4-5).

Witness	July Trial (Approx.)	October Trial Estimate
Darolyn Turner	8	7
Phi Le	10	7
Clifton Harrison	15	7
Susan Thomas	12	7
Jacquelyn Jackson	0	0
Albert Roth	10	7
Rhiannon Doyle	10	7
New Plaintiff (Adrian Gilbert has settled)	10	10
Veronica Thomas	5	5
Alaric Degrafinried	0	0
Jeffrey Lau	15	15
Robert Powers	25	25
Shane Edwards	18	18
Rodney Maplestone	40	25
Tera Stokes-Hankins	12	12
Chief Kevin Franklin	8	8
Nancy McClellan	35	35
Dr. Joseph Lewnard	75	75
Dr. Harvey Risch	30	30
Total	338	300

This witness list omits Dr. Charles Mahla, Plaintiffs' damages expert. (BART did not call a damages expert at the prior trial.) Plaintiffs' exams will be shortened to omit religious belief and damages, but BART must still examine the Plaintiffs concerning their essential job duties and potential accommodations. BART must likewise present testimony from its own witnesses on those subjects (those witnesses are Lau, Powers, Edwards, Maplestone, Stokes-Hankins, and Franklin – of these, only Maplestone addressed religious belief at the July trial and none

1 addressed damages). BART will also present largely the same testimony from its public health
2 experts (McClellan and Dr. Lewnard) and conduct a similar cross-examination of Plaintiffs'
3 expert epidemiologist (Dr. Risch). For BART to receive a fair, adequate opportunity to present
4 its affirmative defense, it must be allotted at least 300 minutes. Anything less would be
5 prejudicial, as evidenced by the prior trial.

6
7 Dated: August 28, 2024

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